91-498

No.

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1991

NEW YORK CITY HOUSING AUTHORITY, HENRY BRESKY, JOHN ARAKE[illegible], LEO LIEBERMAN, LARRY LEFKOWITZ, CYRIL GROSSMAN and RITA COSS,

*Petitioners,*

vs.

CATHERINE OWENS,

*Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

## PETITION FOR A WRIT OF CERTIORARI

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## QUESTIONS PRESENTED FOR REVIEW

1. Whether a plaintiff who alleges that her dismissal from public employment violated the Age Discrimination In Employment Act ("ADEA") (29 U.S.C. §§ 621-634) must prove, as an essential element of her prima facie claim of employment discrimination, that she performed her duties in a manner which met her employer's legitimate expectations.

2. Whether a federal court in an ADEA complaint may deny preclusive effect to a state court decision which affirmed a public employer's determination to dismiss an employee because she had not met the employer's legitimate expectations.

3. Whether a federal court has jurisdiction over a retaliation claim under Title VII of the Civil Rights Act of 1964 ("Title VII") (42 U.S.C. § 2000e *et seq.* (1982)) and under the ADEA, even though that claim was not filed with the United States Equal Employment Opportunity Commission ("EEOC") prior to being presented to the court and even though that claim bears no reasonable, factual relationship to the claims previously filed with the EEOC.

## The Parties

The names of all parties to the proceeding in the Second Circuit are listed in the caption to this Petition.

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The New York City Housing Authority ("the Housing Authority") respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit entered on May 19, 1991.

### JUDICIAL AND ADMINISTRATIVE OPINIONS BELOW

The decision of the administrative trial officer is reproduced in the Appendix (hereinafter "App.") at A59-A82. The unreported

decision of the Supreme Court, New York County, in *Owens v. New York City Housing Authority* is reproduced in App. A83-A86. The unreported decisions of the District Court are reproduced in App. A13-A35. The decision of the Court of Appeals is reported at 934 F.2d 405 (2d Cir. 1991) and is reproduced in App. A1-A12.

## JURISDICTION

The judgment sought to be reviewed was entered May 21, 1991. By order dated August 7, 1991, Justice Marshall extended the Housing Authority's time to petition for certiorari to and including September 18, 1991. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

## CONSTITUTIONAL AND STATUTORY PROVISIONS

United States Constitution, Article IV § 1 provides:

> "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof."

28 U.S.C. § 1738 reads in pertinent part:

> "Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken."

The Age Discrimination in Employment Act, 29 U.S.C. § 626(d), reads in pertinent part:

> "No civil action may be commenced by an individual under this section until 60 days after a charge alleging unlawful discrimination has been filed with the Secretary. Such a charge shall be filed -

(1) within 180 days after the alleged unlawful practice occurred; or

(2) in a case to which section 14(b) [29 U.S.C. §633(b)] applies, within 300 days after the alleged unlawful practice occurred, or within 30 days after receipt by the individual of notice of termination of proceedings under State law, whichever is earlier. Upon receiving such a charge, the Secretary shall promptly notify all persons named in such charge as prospective defendants in the action and shall promptly seek to eliminate any alleged unlawful practice by informal methods of conciliation, conference, and persuasion."

Title VII of the Civil Right Act of 1964, 42 U.S.C. § 2000e-5 provides in pertinent part as follows:

"b) Whenever a charge is filed by or on behalf of a person claiming to be aggrieved, . . . alleging that an employer. . . has engaged in an unlawful employment practice, the Commission shall serve a notice of the charge (including the date, place and circumstances of the alleged unlawful employment practice) on such employer. . . within ten days, and shall make an investigation thereof. Charges shall be in writing under oath or affirmation and shall contain such information and be in such form as the Commission requires. Charges shall not be made public by the Commission. If the Commission determines after such investigation that there is not reasonable cause to believe that the charge is true, it shall dismiss the charge and promptly notify the person claiming to be aggrieved and the respondent of its action. . . . If the Commission determines after such investigation that there is reasonable cause to believe that the charge is true, the Commission shall endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation and persuasion.

• • •

e) A charge under this section all be filed within one hundred and eighty days after the alleged unlawful employment practice occurred and notice of the charge (including the date, place and circumstances of the alleged unlawful employment practice) shall be served upon the person against whom such charge is made within ten days thereafter, except that in a case of an unlawful employment practice with respect to which the person aggrieved has initially instituted proceedings with a State or local agency with authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, such charges shall be filed by or on behalf of the person aggrieved within three hundred days after the alleged unlawful employment practice occurred, or within thirty days after receiving notice that the State or local agency has terminated the proceedings under the State or local law, whichever is earlier, and a copy of such charge shall be filed by the Commission with the State or local agency.

f) If a charge filed with the Commission pursuant to subsection (b) is dismissed by the Commission. . . .or the Commission has not entered into a conciliation agreement to which the person aggrieved is a party, the Commission,. . . shall so notify the person aggrieved and within ninety days after the giving of such notice a civil action may be brought against the respondent named in the charge. . . by the person claiming to be aggrieved. . ."

## INTRODUCTION

At issue in this case is whether a plaintiff alleging discriminatory discharge under the Age Discrimination in Employment Act (ADEA) is prima facie "qualified" for her job, despite a state court decision that she performed her job incompetently and was guilty of gross misconduct and that her continued employment would cause her employer irreparable injury. The court

below held that the plaintiff was not precluded by the state court decision from litigating the qualification element of her prima facie case because it defined "qualified" to mean mere possession of the "basic skills" for the job. Thus, it failed to recognize that whether an incumbent employee is "qualified" depends upon her actual performance on the job. In this respect, the decision below conflicts with the decisions of a majority of the Circuit Courts of Appeals and conflicts with this Court's holdings in similar employment discrimination cases.

A majority of the Circuit Courts have held that an incumbent employee, to prove qualification for the position at issue, must show that she performed her job at a level which met her employer's reasonable expectations, recognizing that actions brought by dismissed employees are different from those brought by rejected applicants. Although the "basic skills" standard is reasonable where an applicant for employment is not hired, it is meaningless when applied to an incumbent employee who, presumably, had met the minimum standards for the position when hired, but whose performance on the job has been inadequate.

The "reasonable expectation" standard comports with this Court's well established requirement that incumbent employees must show as part of their prima facie case under both ADEA and Title VII that they were qualified for the jobs from which they were dismissed. An employee's lack of qualification, demonstrated by her failure to meet her employer's reasonable expectations, is the most common and obvious nondiscriminatory reason for dismissal.

Also at issue in this case is whether a federal court may properly carve out a blanket exception to the Congressional requirement that charges arising under both Title VII and ADEA be presented to the EEOC for investigation and conciliation before being litigated. Under the rule enunciated by the court below, retaliation claims are accorded such a blanket exception, even when those claims bear no relationship to the complaint filed with the EEOC.

The decision below, which conflicts with the decisions of six Courts of Appeals, not only deprived the petitioners of an

opportunity to conciliate plaintiff's retaliation charge, but permitted plaintiff to circumvent Congressional requirements that discrimination charges be timely presented to the EEOC in order to avoid stale claims. Thus, by judicial fiat, the court below altered the method designed by Congress for presenting and resolving Title VII and ADEA claims.

## STATEMENT OF THE CASE

### A. *Facts and State Proceedings.*

On June 17, 1983, the defendant-petitioner New York City Housing Authority ("Housing Authority") served on the plaintiff-respondent Catherine Owens ("Owens"), then a Housing Authority employee, disciplinary charges of incompetency and misconduct, in accordance with Section 75 of the New York State Civil Service Law.[1]

The Housing Authority brought 13 separate charges against Owens, incorporating 27 separate specifications. Twelve of those charges concerned acts of insubordination and misconduct while the thirteenth charged that Owens incompetently performed the important, and statutorily-mandated duty of reviewing the documents that public housing tenants annually submit regarding their family composition and sources and amount of income. *See* 42 U.S.C. §§ 1437a, 1437n. In August 1983 Owens appeared before an administrative trial officer and pleaded not guilty to all the charges.

The trial officer, after an extensive administrative trial covering seven days, recorded in more than one thousand pages of testimony, found Owens guilty of substantially all of the charges and specifications and recommended the penalty of dismissal. The trial officer found that Owens had incompetently performed her income-review duties, despite warnings and counselling from

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[1] Although served on June 17, 1983, the charges are dated June 14, 1983, and, in her complaint to the EEOC, Owens referred to the charges by the June 14th date.

her supervisors. The trial officer also found Owens guilty of gross insubordination to three supervisors over an extended period of time, despite numerous warnings and attempts at counselling.[2]

In his decision, the trial officer stated that Owens's "obstreperous, hostile, aggressive behavior and attitude were often displayed during the hearing" and that Owens had demonstrated throughout the hearings her contempt for authority and for complying with the rules and procedures of the Housing Authority. The trial officer concluded that Owens's disorderly conduct had interfered with the Housing Authority's day-to-day operations, and that, if permitted to go unchecked, would cause irreparable harm to the Housing Authority, its employees and tenants. He recommended Owens's dismissal.

On May 29, 1984, Owens was served with notice of the Housing Authority's determination adopting the trial officer's findings and recommendation terminating her employment. On September 26, 1984, Owens began a proceeding pursuant to Article 78 of the New York State Civil Practice Law and Rules ("CPLR") before the New York State Supreme Court seeking review of her dismissal from the Housing Authority. In a decision dated February 25, 1985, the judge dismissed Owens's petition and found that the administrative record contained

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[2] The trial officer specifically found: on July 21, 1981, Owens had verbally abused and insulted Housing Manager Morris Johnson at Wagner Houses; on September 2, 1982, Owens had disobeyed a supervisor's direct order and had otherwise been insubordinate; on September 3, 1982, Owens had directed foul and abusive language toward Assistant Manager Lawrence Lefkowitz when he attempted to counsel her; on February 18, 1983, in violation of office procedures, Owens had played her radio at an excessively high volume, thereby disrupting work; on March 2, 1983, in response to an inquiry from Lefkowitz, Owens had responded in a loud and abusive manner; on March 10, 1983, Owens had physically menaced Housing Manager John Arakel, and had struck him; on March 22, 1983, Owens had verbally abused Lefkowitz and had falsely accused him of molesting her; on March 23, 1983, Owens verbally abused and directed obscenities toward Lefkowitz; on March 28, 1983, Owens addressed Lefkowitz in a disrespectful and hostile manner and on March 29, 1983, Owens had refused a direct order from Arakel to perform her regularly assigned work duties, had addressed him in a loud and hostile manner, and had physically assaulted him by shoving him with her hand. (App. A59-A82).

"overwhelming" evidence to support the ultimate findings of guilt rendered by the disciplinary trial officer, and that Owens had been accorded due process at her hearing. He also found that the record did not support Owens's allegations that the trial officer had been biased and had denied Owens a fair hearing.

The judge also held that the penalty of dismissal was compelled by the gravity of her offenses and that, in fashioning the penalty to be imposed, the Housing Authority was entitled to consider Owens's entire personnel history. App. A83-A86. Owens took no appeal from that decision.

B. *Owens's EEOC Charges*

On June 27, 1983 Owens filed a complaint with the EEOC, charging her supervisors with harassment and with having brought the disciplinary charges against her. Owens's EEOC complaint charged discrimination on the basis of her sex (female), religion (Christian), age (53), and race (black). The EEOC complaint contained no charge of retaliation. App. A87.

By certified letter dated April 9, 1984, the EEOC issued its "determination as to the merits" of Owens's charges, notifying Owens that it had concluded its processing of both the Title VII and ADEA allegations of the complaint. It issued her a Notice of Right to Sue, and advised her of her statutory right to commence litigation in the federal district court.

C. *Proceedings Below:*

In July 1984 Owens brought this action in the district court pursuant to Title VII of the Civil Rights Act of 1964, for employment discrimination. Owens alleged discrimination because of age, race, gender and religion. Her asserted bases for jurisdiction were 42 U.S.C. § 2000e-5; 42 U.S.C. § 1981 *et seq.* and 28 U.S.C. §§1331, 1343.[3]

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[3] Owens's Complaint to the District Court did not cite the ADEA as a basis for jurisdiction. However, the District Court proceeded on the basis that she had, in fact, asserted an age discrimination claim (App. A25).

In October 1985 the Housing Authority moved for summary judgment. In papers opposing this motion, Owens first asserted claims of retaliation. Specifically, Owens alleged that in August 1983, the Housing Authority's disciplinary trial attorney had stated that he had refused to consider "plea-bargaining" the disciplinary charges then being heard by the administrative trial officer because Owens had filed a charge with the EEOC. Owens also asserted that the disciplinary charges had been preferred against her in June 1983 because she had previously complained about her supervisors to the Housing Authority's in-house Office of Equal Opportunity (App. A19). The district court held that Owens had abandoned her religion, sex and race claims, but did not, at that time, dismiss her age discrimination claim and her newly articulated retaliation claims.

After additional discovery, the Housing Authority again moved for summary judgment in November 1988. The district court held that the Housing Authority was entitled to summary judgment dismissing Owens's ADEA claim of age discrimination. The court further held that the state court decision that Owens was not qualified for her position precluded her from relitigating this element of her prima facie case in federal court. In addition, the district court dismissed Owens's retaliation claims because those charges were not first filed with the EEOC, thus depriving the court of subject matter jurisdiction. It held that a retaliation charge not separately submitted to the EEOC may not be considered by a federal court unless it is reasonably related to a previously filed EEOC complaint, an essentially factual question. The district court found that Owens's claims of retaliation clearly were separate and distinct from the alleged discriminatory conduct she brought to the EEOC's attention on June 27, 1983, which is reflected in the text of the EEOC complaint. (App. A13-A24)

Owens argued that a letter she wrote to the EEOC, dated March 14, 1984, "enunciated her retaliation claim and thereby provided the EEOC with the requisite notice." (App. A89) The district court considered that letter, but did not accept Owens's characterization. In that letter, Owens addressed the Housing

Authority's refusal to transfer her to another work location.* The district court found that this was clearly not the sort of retaliatory conduct which Owens sought to allege in this litigation, and that retaliation because of a request for a transfer, even assuming it had occurred, would not have been triggered by conduct protected by either Title VII or ADEA (App. A23).

Owens's failure to timely present her retaliation claims prejudiced the Housing Authority by denying it the opportunity to timely investigate and conciliate those claims, if warranted. In August 1983, when Owens claims the last act of retaliation occurred, Owens was still a Housing Authority employee, her disciplinary hearing was just beginning and she had not yet been found guilty of any disciplinary charges. Thus, the Housing Authority would have been able to conciliate any retaliation claims if Owens had raised them in a timely fashion and if they had merit. Because Owens chose not to articulate and define those claims until the Housing Authority moved for summary judgment in 1985 — long after she had been dismissed and long after the EEOC investigation concluded — the Housing Authority was deprived of its right to timely notice under both Title VII and ADEA.

On appeal, the Court of Appeals reversed the district court and reinstated Owens's age discrimination and retaliation claims. The Court of Appeals found that although Owens's misconduct was necessarily resolved after a full and fair opportunity to contest that issue in state court, Owens was not precluded by the state court decision from showing that she was qualified for the job in order to establish a prima facie claim under ADEA. The Court of Appeals reasoned that Owens only needed to

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* Owens wrote to the EEOC in part: "Even after I moved to Staten Island and car fare was $4.50 per day ($22.50 per week), I was still not allowed to transfer and was there (at Wagner Houses) for almost three years. As retaliation for my requests for transfers I was written up." In the decision below, the Court of Appeals neither addressed nor considered the denial of Owens's transfer request as a claim of retaliation. 934 F. 2d at 410. The court below addressed only two claims of retaliation: (1) the commencement of disciplinary proceedings allegedly in retaliation for Owens's in-house complaints; (2) the alleged refusal by a Housing Authority attorney to plea-bargain the disciplinary charges.

demonstrate that she ". . .'possesses the basic skills necessary for the performance of (the) job'. . ." in order to satisfy the qualification element of her prima facie claim of age discrimination.

With regard to Owens's retaliation claims, the Court of Appeals held, without explanation, that every alleged claim of retaliation for filing a complaint with the EEOC is related to the original EEOC charge and need never be brought to the attention of either the EEOC or the accused before being presented to the district court.[5]

## REASONS FOR ALLOWING THE WRIT

The decision below should be reviewed for the following reasons:

(1) It conflicts with this Court's ruling in other employment discrimination cases;

(2) It conflicts with the decisions of a majority of circuit courts;

(3) It contravenes the principle that a federal court must accord full faith and credit to a prior state court decision on an issue common to both proceedings; and

(4) It frustrates the statutory scheme of Title VII and ADEA and reaches an unjust result.

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[5] The decision below states, erroneously, that the Housing Authority did not "press" the argument that the refusal to plea bargain was unrelated to the charges in Owens's EEOC complaint. 934 F.2d at 411. The Housing Authority, however, fully briefed and vigorously argued that issue before the court below (App. A92-A100).

The court below also asserted, incorrectly, that the Housing Authority did not contend that Owens needed to file an EEOC complaint specifically alleging that it had commenced the disciplinary proceeding against her in retaliation for her in-house complaints against her supervisors. 934 F.2d at 410, n.3. To the contrary, the Housing Authority never waived this contention. Rather, it did not address this issue directly because, as Owens stated in her brief to the Court below, "the retaliatory conduct at issue in this appeal concerns actions. . . that occurred after Owens filed her complaint with the EEOC in June of 1983 and during the pendency of the EEOC investigation." (App. A101) Owens did not challenge the district court's holding that the retaliation charge concerning events prior to her EEOC filing should have been included in the EEOC complaint.

## DISCUSSION

### 1.

**Where a dismissal from employment for stated cause is challenged under ADEA as discriminatory, the plaintiff must establish, as proof of qualification, that she performed the job at a level which met the defendant-employer's legitimate expectations.**

The Housing Authority urges the Court to accept this issue for review because of a conflict among the Courts of Appeals and because the rule followed by the court below – unlike the rule applied in the majority of the Circuits – does not adequately or reasonably address the issue of what factors disqualify an incumbent employee from continued employment.

In *McDonnell Douglas Corp. v. Green*, 441 U.S. 792 (1973), this Court held, *inter alia*, that a Title VII plaintiff must establish, as a part of her prima facie case, that she was "qualified" for the position at issue. 441 U.S. at 802. The court below accepted, and this petition does not question, that this standard likewise applies to actions brought under ADEA. *Owens v. New York City Housing Authority*, 934 F. 2d 405, 408-409 (2d Cir. 1991) (App. 9). *See e.g. Huhn v. Koehring Co.*, 718 F.2d 239 (7th Cir. 1983); *Kephart v. Institute of Gas Technology*, 630 F.2d 1217 (7th Cir. 1980), *cert. denied* 450 U.S. 959 (1981); *Loeb v. Textron*, 600 F.2d 1003 (1st Cir. 1979).

In the case at bar, the lower court permitted Owens to establish this element of her prima facie case, merely by showing that she possessed the "basic skills" to be hired for the position from which she was terminated. 934 F.2d at 409 (App. A7). By not requiring Owens to demonstrate, in addition, that her on-the-job performance met the Housing Authority's reasonable expectations, the lower court did not give proper regard to principles established by this Court.

This Court has ruled that while the burden of establishing a prima facie case of discrimination is "not onerous", the plaintiff,

to meet that burden, must eliminate "the most common non-discriminatory reasons for the plaintiff's rejection." *Texas Dep't of Community Affairs v. Burdine* 450 U.S. 248, 253-54 (1981), *citing Teamsters v. United States*, 431 U.S. 324, 358, and n. 44 (1977) and *Furnco Construction Corp. v. Waters*, 438 U.S. 567, 577 (1978). One such obvious, nondiscriminatory reason for dismissal is that the employee was not qualified for the position from which she was dismissed. *Burdine, supra*, 450 U.S. at 253.

Six Courts of Appeals have applied the rule which the Housing Authority urges this Court to adopt – that a dismissed employee must demonstrate as prima facie proof of qualification that her job performance met the employer's reasonable expectations.[6] This rule correctly conforms the *McDonnell Douglas* qualification requirement to situations that occur regularly in discrimination claims by discharged employees, but not in claims by non-hired applicants.

The First Circuit was the first to understand, and to respond to, the need to adapt the *McDonnell Douglas* qualification requirement to claims by dismissed employees. *Loeb v. Textron, supra*, 600 F.2d at 1013. Following this Court's reasoning in *Teamsters, supra*, the *Loeb* court held that, to show that he performed the job well enough to justify the inference of qualification, the employee must prove "that he was performing his job at a level that met his employer's legitimate expectations. . . ." *Loeb*, 660 F.2d at 1014. The *Loeb* court recognized that an incumbent employee should not be characterized as "qualified" solely because he was originally hired for the position.

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[6] Indeed, a seventh Circuit is moving toward that position. In 1983, the Eleventh Circuit ruled that the employee's tenure in his or her former position "for a significant period of time" established qualification. *Pace v. Southern Railway Sys.*, 701 F. 2d 1383, 1386, n. 7 (11th Cir.) *cert. denied*, 464 U.S. 1018 (1983). Thus, in dismissal cases brought by employees with on-the-job tenure, this rule exempted the plaintiff from proving qualification as part of his or her prima facie case. Id. at 1386. However, in *Stanfield v. Answering Service, Inc.*, 867 F. 2d 1290 (11th Cir. 1989), that court reestablished qualification as an element of a prima facie case, 867 F. 2d at 1293, and indicated that the dismissed plaintiff's employment record was relevant to that issue. *Id.*, at 1294.

The Seventh Circuit followed *Loeb* in *Kephart v. Institute of Gas Technology, supra.* The *Kephart* court held that the plaintiff was not "ipso facto" qualified for the position because the defendant once hired him, 630 F. 2d at 1219, and that if the plaintiff "was not doing what his employer wanted him to do, he was not doing his job." *Id.*, at 1223. In so holding, the court recognized that, in an ADEA case, a court must make "the allocation of the burden of proof responsive to the need to stop unsupported and malicious suits short of the necessity for a full dress trial." *Id.*, at 1220. *See also, Oxman v. WLS-TV*, 846 F.2d 448 (7th Cir. 1988), (job performance, not basic qualifications, was the "more appropriate concern in a discharge case. . . ." 846 F.2d at 452, n.2.)

The Ninth Circuit followed *Loeb* and *Kephart* in *Douglas v. Anderson*, 656 F.2d 528 (9th Cir. 1981). Citing *Kephart*, the *Douglas* court commented that "one purpose of the allocation of burdens of proof and production in Title VII and ADEA actions is to help district courts to identify meritless suits and to stop them short of full trial." *Id.*, at 535, citing *Kephart*, 630 F. 2d at 1219-20.

In *Lovelace v. Sherwin-Williams Co.*, 681 F.2d 230, 239 n. 8 (4th Cir. 1982) the Fourth Circuit, applying the *Loeb* standard, observed that "discharge cases . . . differ most critically from the refusal to hire decisions for which the *McDonnell Douglas* presumption was originally devised in relation to the 'basically qualified' predicate for the prima facie case". 691 F.2d at 239, n.8, *citing Loeb*, 600 F.2d at 1013-14.

The Eighth Circuit followed *Loeb* and *Douglas* in *Halsell v. Kimberly-Clark Corp.*, 683 F.2d 285 (8th Cir. 1982), which involved, *inter alia*, an ADEA claim by a discharged management-level employee. The *Halsell* court, citing the *Loeb* standard, 683 F. 2d at 290, held that a defendant-employer's testimony that the plaintiff-employee failed to meet the employer's legitimate expectations does not merely create a triable issue of fact. Rather, it destroys the qualification element of the plaintiff's prima facie case. *Id.* at 291. Accordingly, the court upheld the district court's award of a directed verdict for defendant on the ADEA claim.

The Sixth Circuit first enunciated its adherence to the *Loeb* standard in *Wilkins v. Eaton Corp.*, 790 F. 2d 515 (1986). There, the court ruled that the ADEA plaintiff, a dismissed pilot, had met his burden that he "was doing his job well enough to rule out the possibility that he was fired for inadequate job performance, absolute or relative." 790 F. 2d at 521, quoting *Loeb*, 600 F. 2d at 1013. A recent Sixth Circuit case, *Danielson v. City of Lorain*, __ F. 2d __, 56 FEP 614, 1991 U.S. App. Lexis 15252, No. 90-3666 (6th Cir. July 16, 1991) (App. A36-A42) is strikingly similar to the case at bar. In *Danielson*, the court found that the plaintiff had failed to make the requisite showing that she was performing her job well enough to meet her employer's legitimate expectations. The plaintiff claimed that her supervisor had suggested that she retire because of her age, and then set up a "paper trail" to support her ultimate disciplinary dismissal. Slip Opinion at 7 (App. A40). The court acknowledged that if this scenario were true, the district court should not have directed a verdict for the defendant. *Id.* However, the court cautioned: "[I]f a plaintiff is not able to establish that she performed the job at a level that met the employer's legitimate expectations, or that the accusation or poor work was only a pretext, the claim for discrimination cannot be successful." *Id.*[7]

The Second Circuit, in the opinion below, and the Fifth Circuit, in *Bienkowski v. American Airlines, Inc.*, 851 F.2d 1503 (5th Cir. 1988), have applied a contrary rule – that the employee need only demonstrate that he possessed the basic skills for the position. However, the Second Circuit's espousal of the "basic skills" standard in the decision below is an abrupt departure from its own precedent. In *Meiri v. Dacon*, 759 F.2d 989 (2d Cir.), *cert. denied*, 474 U.S. 829 (1985), the court recognized

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[7] The district court's decision had assumed, *arguendo*, that Danielson had established a prima facie case. *Id.*, at 6. (App. A39-A40) Accordingly, the Court of Appeals considered the matter of Danielson's job performance in the light of her claim of pretext, even though the City had moved for a directed verdict at the close of Danielson's case-in-chief. *Id.* In doing so, however, the court accepted Danielson's allegations as true, and weighed them against the facts brought out at her disciplinary proceeding, as well as the manner in which the City conducted that proceeding. *Id.*, at 10-11. (App. A42)

that prima facie qualification for a job could not be "assessed in a vacuum". *Id.* at 995. Rather, the court recognized the need to review the employee's work history, in the light of the employer's "legitimate expectations" regarding job performance. *Id., quoting Huhn v. Koehring Co., supra*, 718 F.2d at 244. In *Meiri*, as in the case at bar, the defendant-employer specifically told the plaintiff-employee that she was fired for inappropriate and often insubordinate behavior. 759 F.2d at 992, 993.[8]

In *Bienkowski, supra*, the Fifth Circuit criticized *Loeb* and the Circuits that follow the *Loeb* rule by knocking down a straw-man it called "redundancy". 851 F.2d at 1505. The *Bienkowski* court suggests that, under *Loeb*, a court in a Title VII or ADEA case must review the plaintiff-employee's qualifications twice: first, for the prima facie element of qualification and again, as part of the defendant-employer's statement of valid non-discriminatory grounds for dismissal. However, the *Bienkowski* court cites only cases in which the issue was decided once: *Huhn, supra, Lovelace, supra, Wilkins, supra*. 851 F.2d at 1505. The *Bienkowski* court asserts that the *Huhn* and *Lovelace* courts avoided the issue, but, those courts only responded to how the district judges in those cases controlled the proof that the plaintiff-employee failed to meet the defendant-employer's legitimate expectations. In *Wilkins*, the employer's reason for firing the plaintiff had nothing to do with his qualifications, but involved his dispute with management over a specific work procedure. 790 F.2d at 518.[9]

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[8] The Second Circuit, in the decision below, mistakenly cited *Powell v. Syracuse University*, 580 F.2d 1150 (2d Cir.), *cert. denied*, 439 U.S. 984, 99 S.Ct 576, 58 L.Ed 2d 656 (1978) as its principal authority for holding that a dismissed employee's qualification is gauged by the same criterion of basic competence as a rejected applicant. But in fact *Powell* held that the basic competence criterion applies where the employer did not, prior to the dismissal, explicitly express dissatisfaction with the employee's work. *Id.* at 1155, quoting *Flowers v. Crouch-Walker Corp.*, 552 F.2d 1277, 1283 (7th Cir. 1977).

[9] Indeed, the court specifically found that Wilkins, who had been a company pilot, had met his employer's reasonable expectations, in that he was a "superb pilot." *Id.*, at 521.

The *Bienkowski* court apparently confused litigation management with the underlying issue of what standard determines whether a discharged employee was qualified for the position from which he was fired. A trial judge may elect to take under advisement a defendant's motion for a directed verdict at the close of plaintiff's case, listen to defendant's evidence and then grant the motion. The judge may also, as in the case at bar, grant the defendant summary judgment based on a prior judicial and administrative record which fully explored the issue of the plaintiff's qualifications. What is important is not the particular method the judge uses to arrive at a correct result, but the standard the judge relies on to achieve that result.

The Housing Authority urges this Court to accept the "employer's reasonable expectation" standard because it is consistent with principles established by this Court's prior decisions, while the "basic skills" standard is not. Moreover, a court cannot rationally determine an incumbent employee's qualifications, unless it reviews the employee's work history, in the light of the employer's reasonable expectations regarding job performance.

2.

**Plaintiff is collaterally estopped from proving that she was qualified for the position from which the Housing Authority terminated her.**

The rule adopted by the court below contravenes the principle that a federal court must accord full faith and credit to a prior state court decision on an issue common to both proceedings, where a court of that state would likewise be obliged to do so. 28 U.S.C. § 1738; *Migra v. Warren City School Dist.*, 465 U.S. 75, 80, (1984); *Kremer v. Chemical Constr. Corp.*, 456 U.S. 461, 476 (1982). Here, the issue is whether Owens met the Housing Authority's reasonable expectations and was, therefore, qualified for the position from which she was terminated. The state court decided that issue against Owens, but the court below failed to accord that decision preclusive effect.

The decision of the Supreme Court, New York County (App. A83-A86), in a proceeding under Article 78 of New York's CPLR ("Article 78 proceeding") affirmed the Housing Authority's decision to terminate Owens's employment. The New York County Supreme Court adopted the following findings of the Trial Officer, which plainly establish plaintiff's failure to have met the Housing Authority's reasonable expectations:

> It is the finding and opinion of the undersigned, that the respondent engaged in disorderly and disruptive behavior when assigned to the LaGuardia Houses, and was insubordinate, disrespectful, threatening and abusive to her supervisors, to the extent that the day to day operations of LaGuardia Houses were adversely affected. The respondent's obstreperous, hostile, aggressive behavior and attitude, were often displayed during the hearing. Ms. Owens demonstrated throughout the hearings, her contempt for authority, and for complying with the rules and procedures of the Authority.
>
> The respondent's bad temper, abusive and threatening language, and do as I please attitude, if permitted to go unchecked, will cause irreparable harm and damage for the Authority, its employees and tenants.

App. A82.

The court also addressed the manner in which the trial officer conducted the hearing, and whether plaintiff was treated fairly:

> Upon a reading of the record and the Trial Officer's thorough and complete recitation of the facts and testimony . . . petitioner was accorded due process and fundamental fairness.

App. A85.

This Court's holding in *Kremer*, *supra*, and decisions by New York State's Court of Appeals, its highest court, establish that a New York State court would have precluded relitigation of

issues necessarily decided in the Article 78 proceeding and in the underlying administrative hearing. *Matter of Choi v. State of New York*, 74 N.Y.2d 933, 549 N.E.2d 469, 550 N.Y.S.2d 267 (1989); *Clemens v. Apple*, 65 N.Y.2d 746, 481 N.E.2d 560, 492 N.Y.S.2d 20 (1985); *Ryan v. New York Telephone Co.*, 62 N.Y.2d 494, 500, 467 N.E.2d 487, 478 N.Y.S.2d 823 (1984).

3.

**For a district court to have jurisdiction over an unfiled claim of retaliation, that claim must bear a reasonable, factual relationship to the filed EEOC complaint.**

In enacting Title VII and ADEA, Congress required that before filing an action in a federal district court alleging a discriminatory employment practice, an aggrieved employee must file a complaint with the EEOC. 42 U.S.C. § 2000e-5(a) (Title VII), 29 U.S.C. § 626(d) (ADEA). This requirement promotes the resolution of employment disputes through conciliation rather than litigation and gives formal notice to the employer. If conciliation efforts fail, then the aggrieved employee may opt to become a plaintiff in federal court, basing his or her complaint on the charges filed with the EEOC. As the Seventh Circuit stated:

> Allowing a complaint to encompass allegations outside the ambit of the predicate EEOC charge would circumvent the EEOC's investigatory and conciliatory role, as well as deprive the charged party of notice of the charge, as surely as would an initial failure to file a timely EEOC charge.

*Babrocky v. Jewel Food Co.*, 773 F.2d 857, 864 (7th Cir. 1985).

Responding to the defense that a claim of retaliation in a district court complaint falls outside the EEOC charges, a majority of the Courts of Appeals that have considered the issue require that the retaliation claim be factually related to the filed

charges. The Sixth, Eighth, Ninth and Tenth Circuits require a "reasonable relationship" between the filed and unfiled charges. *See, e.g., Wentz v. Maryland Casualty Co.*, 869 F.2d 1153, 1154-55 (8th Cir. 1989); *Brown v. Hartshorne Pub. School Dist. #1*, 864 F.2d 680, 682 (10th Cir. 1988); *Mlinaric v. Parker Hannifin Corp.*, 853 F.2d 927 (6th Cir. 1988) (unpublished decision, App. A43-A58); *Oubichon v. North American Rockwell Corp.*, 482 F.2d 569, 571 (9th Cir. 1973); *Tipler v. E.I. DuPont & Co.*, 443 F. 2d 125, 131 (6th Cir. 1971). Similarly, the Third and Seventh Circuits require that the unfiled charge be within the scope of the EEOC's investigation of the filed charge. *See, e.g., Steffen v. Meridian Life Ins. Co.*, 859 F.2d 534, 544-45 (7th Cir.), *cert. denied*, 491 U.S. 907 (1989); *Waiters v. Parsons*, 729 F.2d 233 (3d Cir. 1984). Thus, the rule announced by the court below, that an unfiled retaliation claim, as a matter of law, may be a part of the plaintiff's judicial complaint, is in conflict with the rules followed in six circuits.

Moreover, that rule conflicts with the Second Circuit's own decisions. Prior to the case at bar, the Second Circuit required that the district court find, as a matter of fact, that filed and unfiled charges were reasonably related. *Stewart v. United States Immigration and Naturalization Service*, 762 F.2d 193, 198 (2d Cir. 1985).[10] Stewart's EEOC complaint and Title VII action charged disparate treatment in working conditions. Nine months after filing suit, he sought a preliminary injunction to overturn his employer's decision to suspend him, pending the resolution of criminal charges. Stewart claimed that by suspending him, his employer retaliated against him for his original discrimination complaint. *Id.* at 196. The Second Circuit rejected Stewart's retaliation claim, holding that it was not reasonably related to the original EEOC charge and that the EEOC's administrative remedies should have been invoked and exhausted, and commented:

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[10] Neither of the two cases cited by the Second Circuit in the decision below to support its position, hold that a retaliation claim is "reasonably related," as a matter of law, to any prior claim. *See Kirkland v. Buffalo Bd. of Educ.*, 622 F.2d 1066, 1068 (2d Cir. 1980)(*per curiam*); *Goodman v. Heublein, Inc.*, 645 F.2d 127, 131 (2d Cir. 1981).

> Indeed, the purpose of the exhaustion requirement, which is to give the administrative agency the opportunity to investigate, mediate, and take remedial action, would be defeated if we were to permit Stewart to by-pass exhaustion in the present case.

*Id.*

In *Steffen*, *supra*, the Seventh Circuit applied a variation of the "reasonable relationship" test, requiring that the charges in the EEOC complaint and the unfiled charges be of a similar nature. Steffen's EEOC complaint alleged the defendant replaced him with a younger man and later terminated him because of his age, but did not claim retaliation. The Seventh Circuit held that Steffen's later retaliatory discharge claim failed as a matter of law:

> Steffen's retaliation claim injects an entirely new theory of liability into the case alleging unlawful activity of a much different nature than the age discrimination alleged in the charge.

*Id.* at 545. *See also Sherman v. Standard Rate Data Serv., Inc.*, 709 F. Supp. 1433, 1441-42 (N.D. Ill. 1989) (retaliatory discharge claim dismissed).[11]

In *Waiters*, *supra*, the Third Circuit specifically declined to adopt the rule that a retaliation claim is related, *per se*. *Id.* at 237, n. 10. Rather, the court established a two-pronged test which, as in *Steffen*, compares the unfiled retaliation claim with the charges in the ADEA complaint: (1) the original, filed claim and the retaliation claim must have the same "core grievance"

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[11] The *Steffen* standard, if applied to the case at bar, clearly prohibits both unfiled retaliation claims that the court below considered: (1) that the Housing Authority brought disciplinary charges against Owens because of her in-house complaints against her supervisors, 934 F. 2d at 410, n. 3; and (2) that the attorney who prosecuted those charges refused to plea-bargain with her. 934 F. 2d at 410.

and (2) the retaliation claim must fall within the scope of the EEOC's investigation of the filed charges. *Waiters*, 729 F.2d at 238.

While the First Circuit Court of Appeals has not addressed this issue, the Massachusetts district court has followed the Third Circuit's standard. *See Walters v. President & Fellows of Harvard College*, 616 F. Supp. 471, 475 & n.2 (D. Mass. 1985). There, the district court distinguished between retaliation as the motive for alleged discriminatory acts within the scope of the EEOC's investigation and retaliation based on separate incidents. 616 F. Supp. at 475. The plaintiff could properly present to the district court an unfiled claim of retaliation as motive, but could not assert retaliation as a separate incident, unless the incident fell within the purview of the EEOC's investigation. *Id.*

In *Aronberg v. Walters*, 755 F.2d 1114, 1115 at n.1 (4th Cir. 1985), the plaintiff-employee invited the Fourth Circuit to rule that an unfiled retaliation claim may, as a matter of law, be a part of the plaintiff's judicial complaint, but the court declined that invitation.[12] However, the District Court of Maryland, has twice specifically rejected that rule. *See Pritchett v. General Motors Corp.*, 650 F. Supp. 758, 762 (D. Md. 1986); *Bickley v. Univ. of Maryland*, 527 F. Supp. 174, 177-79 (D. Md. 1981).

In sharp contrast, the Fifth and Eleventh Circuits (now joined by the Second Circuit) hold that all claims of retaliation based on the filing of an EEOC complaint are "ancillary" to the original complaint. *Gupta v. East Texas State Univ.*, 654 F.2d 411, 413-14 (5th Cir. 1981);[13] *Baker v. Buckeye Cellulose Corp.*, 856 F.2d 167, 169 (11th Cir. 1988); *Gottlieb v. Tulane University*, 809 F.2d 278, 284 (5th Cir. 1987).

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[12] The alleged retaliatory action occurred after plaintiff filed her Title VII complaint in the District Court. Accordingly, the Court ruled that the District Court could consider the retaliation issue in deciding plaintiff's motion for a preliminary injunction to preserve the *status quo ante*. *Id.*

[13] It is noteworthy that, as in *Aronberg*, *supra*, the alleged retaliation in *Gupta* occurred after the action had been commenced. 654 F. 2d at 413. Nevertheless,

*(Footnote continued)*

It is noteworthy that the Fifth Circuit does not accord such *per se* jurisdiction to any other sort of Title VII claim not previously filed with the EEOC. For any unfiled claim, other than a claim of retaliation, the Fifth Circuit's rule is that "[t]he scope of inquiry of a court hearing in a Title VII action is limited to the 'scope' of the EEOC investigation which can reasonably be expected to grow out of the charge of discrimination." *Young v. City of Houston*, 906 F. 2d 177, 179 (5th Cir. 1990), *quoting Sanchez v. Standard Brands*, 431 F. 2d 455, 466 (5th Cir. 1970). *See also, Ghahramani v. BASF Corp.*, 755 F. Supp. 708, 711, n. 12 (M.D. La. 1991) (new claims dismissed where they could not "reasonably be expected to have grown out of the scope of the EEOC's investigation"). In *Baker, supra*, the Eleventh Circuit rationalized that a retaliation claim always would be expected to grow out of the original charge of discrimination. 856 F.2d at 169. However, this rationale is not borne out by the experience of those courts that have rejected the *Gupta* rule and certainly is not borne out by the case at bar, where the alleged sources of the retaliatory conduct against Owens had nothing to do with the facts alleged or persons named in her EEOC complaint. (App. A87).

The rule adopted by the court below violates the intent of Congress in two important ways. First, it contravenes the EEOC's statutory mandate "to endeavor to eliminate" unlawful employment practices through "informal methods of conference, conciliation and persuasion." 42 U.S.C. § 2000e-5(b); 29 U.S.C. § 626(b). *See Stewart, supra*, 762 F.2d at 198. The rule interferes with Congress's conception of the EEOC's role, in that it encourages employees to withhold retaliation claims until filing suit. Indeed, Congress did not intend that a complainant would file an EEOC complaint merely as the first step to filing suit. Rather, Congress directed the EEOC to resolve those charges it had reasonable cause to believe through nonjudicial dispute resolution techniques.

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the *Gupta* Court elected to establish a broad-based rule for retaliation claims, rather than the narrow rule followed in *Aronberg*. By contrast, in the case at bar, the alleged retaliation occurred nearly one year before the action was filed. 934 F.2d at 407 (App. A4).

*Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. ____, 114 L.Ed.2d 26, 39 (1991). A lawsuit would result only if the EEOC's efforts failed. *See* 2 Larson, EMPLOYMENT DISCRIMINATION § 48.30 at 9A-124 (1990).

Second, in enacting Title VII and the ADEA, Congress established the principle that a complaint must be filed with EEOC while it is still fresh, to facilitate conciliation efforts.[14] This Court has analogized the statutory time limit for filing an EEOC complaint to a statute of limitations, since its purpose is to avoid stale claims. *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 394 (1982). The Second Circuit's holding permits a Title VII or ADEA plaintiff to disrupt that time frame, since the plaintiff may, several years after filing initial EEOC charges, decide that he also has a claim based on retaliation.

The case at bar shows the difficulties posed by the *Gupta* rule. In practice, it rewards claimants who should address their retaliation claims to the EEOC, but instead bypass the EEOC in favor of litigation and raise their claims in court long after they have grown stale. In the case at bar, Owens first asserted her retaliation claims twenty-seven months after she claimed retaliatory acts had occurred.[15] Moreover, Owens's retaliation claims bore no factual relation to her original EEOC complaint which accused two supervisors of discrimination on account of race, sex, religion and age. Rather, she asserts (1) that the Housing Authority brought disciplinary charges against her in response to her in-house complaints against her supervisors; (2) that a Housing Authority attorney failed to plea bargain disciplinary charges against her. 934 F. 2d at 407 (App. A4-A5). Investigating

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[14] "[T]o avoid the pressing of 'stale' claims, the title provides that no suit may be brought with respect to any practice occurring more than 6 months prior to filing of a charge with the Commission." 110 Cong. Rec. S7243 (daily ed. April 8, 1964) (statement of Sen. Case).

[15] In *Bickley, supra*, 527 F. Supp. at 179 the court dismissed a retaliation charge filed two years after the retaliation allegedly occurred because there was no "opportunity for administrative conciliation while the alleged discrimination was still fresh."

her original complaint, EEOC could not have reached her retaliation claims, since those claims involved different parties and different issues.

In adopting the *Gupta* rule, the court below is rewarding a litigation strategy that encourages retaliation claimants to ignore the EEOC and to introduce such charges at a much later date in the course of a federal lawsuit. That rule is legally erroneous, unsound in practice, and should not stand.

## CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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